Supreme Court, U.S.
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No. 00-726

In The

Supreme Court of the United States

SRABANA GUPTA,

Petitioner,

vs.

FLORIDA BOARD OF REGENTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S, FLORIDA BOARD OF REGENTS, BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari, vacate and remand, in light of *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S.___, 120 S. Ct. 2097 (2000), a case in which the court of appeals based its reversal of the trial court on evidence rejected by the jury?

2. Does a district court's determination concerning judgment as a matter of law command the same deference as factual findings at bench trials, rulings on motions for new trial, and decisions on preliminary injunctions?

3. Is the existence of a hostile environment a question of fact for the jury or a question of law for an appeals court?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statutes Or Other Provisions Involved 1

Statement of the Case 1

Reasons for Denying the Writ 3

I. The Decision Rendered By The United States Court Of Appeals For The Eleventh Circuit Does Not Conflict With This Court's Decision In *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S.___, 120 S. Ct. 2097 (2000) And Does Not Contravene The Seventh Amendment 5

II. The Eleventh Circuit's Decision Does Not Conflict With Any Recent Decision Of Any Court Of Appeals As To The Appropriate Standard For Reviewing A Trial Court's Decision On A Rule 50 Motion 12

III. This Court May Not Review A Question Not Considered Or Decided By The United States Court Of Appeals For The Eleventh Circuit .. 16

Conclusion 19

TABLE OF AUTHORITIES

Page

CASES

Advantor Capital Corp. v. Yeary, 136 F.3d 1259 (10th Cir. 1998) 15

Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Company, 152 F.3d 17 (1st Cir. 1998), *cert. denied*, 526 U.S. 1123, 119 S. Ct. 1778 (1999)..... 15

Baltazor v. Holmes, 162 F.3d 368 (5th Cir. 1998) 15

Barber v. CSX Distribution Services, 68 F.3d 694 (3d Cir. 1995) 15

Cinematronics, Inc. v. Electronic Sports Research, 916 F.2d 1444 (9th Cir. 1990)..... 12

Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997), *cert. denied sub. nom., Combs v. Metal Craft Co.*, 522 U.S. 1045, 118 S. Ct. 685 (1998)..... 15

Criado v. IBM Corp., 145 F.3d 437 (1st Cir. 1998)..... 15

Eberhardt v. Integrated Design & Construction, Inc., 167 F.3d 861 (4th Cir. 1999)..... 15

Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998) 4, 17

Fishman v. Clancy, 763 F.2d 485 (1st Cir. 1985)..... 14

Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1998)...15, 16

Harris v. Fork Lift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367 (1993) 4, 17

Herold v. Burlington Northern, Inc., 761 F.2d 1241 (8th Cir. 1985), *cert. denied*, 474 U.S. 888, 106 S. Ct. 208 (1985) 14

Howard v. Burns Bros., Inc., 149 F.3d 835 (8th Cir. 1998)..... 15

TABLE OF AUTHORITIES – Continued

Page

Indest v. Freeman Decorating, 164 F.3d 258 (5th Cir. 1999) 18

Jordan v. Clark, 847 F.3d 1368 (9th Cir. 1988), *cert. denied, Jordan v. Hodel*, 488 U.S. 1006, 109 S. Ct. 786 (1989) 15

Kiner v. Northcutt, 424 F.2d 222 (10th Cir. 1970) 14

Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S. Ct. 531 (1923) 6

Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999) (en banc), *cert. denied*, ___U.S.___, 120 S. Ct. 1674 (2000) 18

Meritor Savings Bank v. Vincent, 477 U.S. 577, 106 S. Ct. 2399 (1986) 17

Moore v. Kuka Welding Systems & Robot Corp., 171 F.3d 1073 (6th Cir. 1999) 15

Morse v. Southern Union Co., 174 F.3d 917 (8th Cir. 1999), *cert. dismissed*, 527 U.S. 1059, 120 S. Ct. 29 (1999) 15

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S. Ct. 1072 (1967) 11, 12

Nelson v. Production Credit Association of the Midlands, 930 F.2d 599 (8th Cir. 1991), *cert. denied*, 502 U.S. 957, 112 S. Ct. 417 (1991) 12

Oncale v. Sundowner OffShore Services, Incorporated, 523 U.S. 75, 118 S. Ct. 998 (1998) 4, 17

Reeves v. Sanderson Plumbing, Inc., 530 U.S.___, 120 S. Ct. 2097 (2000) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Reeves v. Sanderson Plumbing Products, Inc., 197 F.3d 688, 691 (5th Cir. 1999), *reversed on other grounds*, 530 U.S.___, 120 S. Ct. 2097 (2000) 14

Riemer v. Illinois Department of Transportation, 148 F.3d 800 (7th Cir. 1998) 15

Sales v. Grant, 158 F.3d 768 (4th Cir. 1998) 15

Weisgram v. Marley Company, 528 U.S. 440, 120 S. Ct. 1011 (2000) 11, 12

Weisgram v. Marley Company, 169 F.3d 514 (8th Cir. 1999), *affirmed*, 528 U.S. 440, 120 S. Ct. 1011 (2000) 15

FEDERAL STATUTES:

42 U.S.C. § 2000e-3(a) 1

RULES:

SUP. CT. R. 10 ..... 3, 6, 18

FED. R. CIV. P. 50 ..... *passim*

FED. R. CIV. P. 50(a) 11

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the statute cited in the Petition, Petitioner's Supplemental Complaint below alleged a cause of action for retaliation pursuant to 42 U.S.C. § 2000e-3(a), which provides, in pertinent part:

> 2000e-3. Other unlawful employment practices
>
> (a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

Petitioner's, Srabana Gupta ("Gupta" or "Petitioner"), statement of the case (Pet. 3-5) is an inflammatory, misleading and exaggerated recitation that fails to apprise this Court of the facts necessary to review the questions presented.

Respondent, the Florida Board of Regents (the "Board"), incorporates by reference the procedural background and statement of the facts in the opinion of the Eleventh Circuit. (Pet. App. A at 1a-13a).

The Petition contains numerous misstatements of fact that are addressed below:

The statements that "Professor Rupert Rhodd began pursuing his future colleague, Srabana Gupta, the moment she stepped off the plane for her job interview" and characterization of "Rhodd's unrelenting (even if unrequited) courtship of Gupta" are inaccurate. Gupta never accused Professor Rhodd of making sexual advances and, in fact, confirmed that he never made any sexual advances toward her. (RS-398, 405, 434-435, 447).

The statement that "William Stronge . . . recommended against Gupta's getting a psychiatrically-related extension of time to achieve tenure" is inaccurate and mischaracterizes the evidence. (Pet. 4) Indeed, Professor Stronge recommended against Gupta's requested extension of time to achieve tenure. Gupta's request, however, "stated as its only ground that the criteria for [tenure] evaluation had changed, *not that any medical problem she had would warrant an extension.*" (Pet. App. A at 36a) (emphasis added) (R-6-295, 296; Plaintiff's Exhibit 17).

Footnote 1 of the Petition (Pet. 4) is also inaccurate. The evidence established that of the seven incidents Gupta contended to be adverse employment actions, five lacked the necessary proof of conduct that "alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." (Pet. App. A at 25a-31a). Although the Eleventh Circuit concluded that the two remaining incidents constituted adverse employment actions, it nevertheless concluded that "[t]he meager evidence, or lack of it, produced by Gupta in response" to the Board's evidence of nondiscriminatory reasons for the employment actions

"did not permit the jury to 'legitimately draw the inference' that the Board's proffered nondiscriminatory reasons for its employment decisions were pretextual and that the reasons behind their actions were retaliatory." (Pet. App. A at 36a).

The statements that "Mary McBride, a vice president who called Gupta's complaint a "shame," (Pet. 4) and "McBride, whose condemnation of Gupta's complaining about Rhodd as a 'shame'"[sic] (Pet. 8), imply a criticism of Gupta that is not borne out by the evidence, and further highlight Gupta's penchant for embellishing otherwise inoffensive speech and conduct. Dr. McBride actually explained:

> I think it is a shame that we could not work this out between two highly educated, fine people. I think it is a shame that these people have had to sit here, as I have, all week, and that families have been attacked and, yes, I think it's a shame. I think it's a deep shame. It is regrettable. And I explained in my deposition that I was using shame in that sense, not in the sense of shameful, but regrettable that we could not work this out among the people involved.

(R-8-877).

REASONS FOR DENYING THE WRIT

This Petition demonstrates the wisdom of the admonition in this Court's Rule 10 that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The Eleventh Circuit reviewed all of the evidence presented at the trial of this

hostile work environment sexual harassment and retaliation case in compliance with the standard of review dictated by Rule 50 and enunciated by this Court in *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S.___, 120 S. Ct. 2097 (2000). The court properly exercised its gatekeeper function under *Harris v. Fork Lift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993), in reversing the district court and entering judgement as a matter of law in favor of Respondent. Petitioner's attempt to invoke this Court's *certiorari* jurisdiction on the basis that the Eleventh Circuit's decision conflicts with *Reeves* and decisions of other courts of appeal is meritless.

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), this Court directed the district courts and courts of appeal to enter judgment as a matter of law in favor of employers in order to filter out claims lacking objective evidence of extreme or pervasive discriminatory conduct. That the Petitioner may not agree with the Eleventh Circuit's application of the properly stated rules of law announced in this Court's *Reeves, Faragher, Harris,* and *Oncale*[1] decisions is not a reason for this Court to grant *certiorari* to reconsider the evidence for itself.

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[1] *Oncale v. Sundowner OffShore Services, Incorporated*, 523 U.S. 75, 118 S. Ct. 998 (1998).

I.

THE DECISION RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *REEVES V. SANDERSON PLUMBING, INC.*, 530 U.S.___, 120 S. Ct. 2097 (2000) AND DOES NOT CONTRAVENE THE SEVENTH AMENDMENT

First and foremost, this Court should deny certiorari review because the question presented in the Petition misstates and mischaracterizes this Court's decision in *Reeves*, 530 U.S.___, 120 S. Ct. 2097. Neither the Fifth Circuit's decision, nor this Court's decision supports Petitioner's assertion that the "court of appeals based its reversal of the trial court on evidence rejected by the jury." (Pet. i).

Moreover, in a transparent attempt to grab this Court's attention, Petitioner argues that the Eleventh Circuit's ruling conflicts with this Court's decision in *Reeves*. Petitioner fails, however, to point out how the Eleventh Circuit's decision conflicts with *Reeves*. Instead, Petitioner argues that the Eleventh Circuit misapplied the standard of review dictated by Rule 50 as enunciated by this Court in *Reeves* and as permitted under the re-examination clause of the Seventh Amendment. (Pet. 6).

A fair reading of the Petition suggests that Petitioner merely requests that this Court re-evaluate whether the Eleventh Circuit correctly determined that the Board was entitled to judgment as a matter of law based upon Petitioner's failure to present sufficient evidence to support a jury verdict for either her claim of sexual harassment or retaliation under Title VII. This does not present a question of conflict for this Court to resolve under Supreme

Court Rule 10, but rather is re-argument of the merits of the case, and thus does not provide a basis for jurisdiction. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S. Ct. 531, 532 (1923) (the jurisdiction of the Supreme Court by way of certiorari was not conferred merely to give the defeated party in the circuit court another hearing); SUP. CT. R. 10 (a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law).

Even if this Court were to consider Petitioner's argument, this Court must deny review because the Eleventh Circuit's decision does not in fact conflict with *Reeves*. In *Reeves*, this Court reiterated, confirmed and resolved any conflict concerning the appropriate evidentiary standard for reviewing a district court's denial of a Rule 50 motion for judgment as a matter of law. This Court reiterated that a court should render a judgment as a matter of law under Rule 50 when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Reeves*, 120 S. Ct. at 2109.

This Court then outlined what evidence a court should consider in ruling on a Rule 50 motion. In doing so, this Court analogized the standard for granting a summary judgment as mirroring the standard for judgment as a matter of law and determined that the court should "review all of the evidence in the record," and "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* at 2110.

Contrary to Gupta's assertion (Pet. 6-8), the Eleventh Circuit's opinion clearly reflects that it applied the correct standard of review as set forth by this Court in *Reeves*. (Pet. App. A at 13, 14a and 24a). The Eleventh Circuit's decision contains a painstaking analysis of all of the evidence presented in light of the standard of review dictated by Rule 50.

Petitioner fails to point to any critical evidence favorable to Petitioner that the Eleventh Circuit disregarded, any examples of where the Eleventh Circuit failed to draw all reasonable inferences in favor of Petitioner, or any particular evidence submitted by Petitioner that the court discredited. Nor does Petitioner point to any evidence that the court failed to consider that would provide sufficient evidence for a reasonable jury to have found that the Board's explanation for its employment decisions was pretextual. Consequently, Petitioner cannot establish that the Eleventh Circuit's decision either conflicts with or fails to follow this Court's decision in *Reeves*.

Further, this case is factually distinguishable from *Reeves*. Specifically, the issue presented to this Court in *Reeves* was the evidentiary burden borne by a plaintiff who attempts to prove intentional discrimination through indirect evidence. This Court decided whether an employer was entitled to judgment as a matter of law under the particular circumstances presented. This Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S. Ct. at 2109.

However, this Court in *Reeves* went on to add that:

> This is not to say that such a showing [of falsity or pretext] by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not treat discrimination differently from other ultimate questions of fact.
>
> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. For purposes of this case, we need not – and could not – resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law. It suffices to say that, because a prima facie case

> and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.

Ibid. (emphasis added) (internal citations and quotation marks omitted).

This Court further held that the court of appeals erred in overturning the jury's verdict given that the plaintiff "established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence of age-based animus," thereby providing "sufficient evidence for the jury to find that respondent had intentionally discriminated." *Reeves*, 120 S. Ct. at 2112.

Reeves is not factually on point with the present case since there are substantial differences in the quantity and quality of proof presented by Petitioner. Petitioner's case is a far cry from *Reeves*. As the Eleventh Circuit held, Petitioner made no showing, much less a substantial showing, that the Board's legitimate, nondiscriminatory reasons for declining to extend her tenure clock and for not giving her a merit pay raise were pretextual or false. In fact, the Eleventh Circuit found that Petitioner had produced no evidence upon which a reasonable fact-finder could conclude that the Board's explanation for not awarding a merit pay raise was pretextual. The court went on to state the following:

> After a thorough review of the record, we hold that Gupta failed to present sufficient evidence

> at trial to support the jury's verdict of retaliation. Although Gupta satisfied the elements of a retaliation claim, the Board presented non-discriminatory reasons for its actions. The meager evidence, or lack of it, produced by Gupta in response did not permit the jury to "legitimately draw the inference" that the Board's proffered non-discriminatory reasons for its employment decisions was pretextual and that the reasons behind their actions were retaliatory. *Sullivan*, 170 F.3d at 1061. No reasonable juror could have found that the Board retaliated against Gupta because she filed a claim of sexual harassment.

(Pet. App. A at 36a-37a).

Petitioner further asserts that the court of appeals violated the re-examination clause of the Seventh Amendment when it chose to recognize the non-discriminatory explanations offered by the Board's witnesses concerning why she was denied both a pay raise and a tenure clock extension. Petitioner concludes that the court of appeals could only have reached its decision by accepting testimony that the jury necessarily rejected. (Pet. 6-7).

Petitioner's argument fails to consider a court's role in considering a Rule 50 motion for judgment as a matter of law. Petitioner's argument further fails to state upon what basis it concludes that the court of appeals accepted testimony that the jury necessarily rejected. As set forth above, Petitioner fails to point to any evidence that she presented from which a reasonable jury could infer that the Board's explanation for its employment decision was pretextual.

The cases relied upon by Petitioner to support her argument that the Eleventh Circuit's decision contravenes the Seventh Amendment predate the adoption of the Federal Rules of Civil Procedure. Rule 50 of the Federal Rules of Civil Procedure specifically permits a court to enter a judgment as a matter of law when "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." FED. R. CIV. P. 50(a). In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072 (1967), this Court reviewed its prior jurisprudence and held that an appellate court does have the power to order the entry of judgment as a matter of law upon finding that a district court erroneously denied a motion for judgment as a matter of law.

Recently, this Court addressed the issue of whether Rule 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that certain evidence was erroneously admitted at trial and that the remaining, properly admitted evidence was insufficient to support the jury's verdict in *Weisgram v. Marley Company*, 528 U.S. 440, 120 S. Ct. 1011 (2000). This Court revisited *Neely*, stating that "[i]t was settled . . . that a trial court, pursuant to Rule 50(b), could enter judgment for the verdict loser without offense to the Seventh Amendment." *Weisgram*, 120 S. Ct. at 1018 (citations omitted). This Court adhered to *Neely*'s holding and rationale in holding that a court of appeal's authority to direct entry of judgment as a matter of law did extend to cases in which, on excision of testimony erroneously admitted, there remained insufficient evidence to support the jury's verdict. *Id.* at 1022.

Based upon *Neely* and *Weisgram*, the Eleventh Circuit's decision to reverse the district court's denial of the Board's motion for judgment of matter of law because there was insufficient evidence to support the jury's verdict does not contravene the re-examination clause of the Seventh Amendment. *See also, Nelson v. Production Credit Association of the Midlands*, 930 F.2d 599, 604 n. 6 (8th Cir. 1991), *cert. denied*, 502 U.S. 957, 112 S. Ct. 417 (1991) (the Supreme Court has long held that the question of whether there is sufficient evidence to support submission of an issue to the jury is a legal determination and that entry of judgment notwithstanding the verdict under Fed.R.Civ.P. 50(b) does not contravene the Seventh Amendment); *Cinematronics, Inc. v. Electronic Sports Research*, 916 F.2d 1444, 1451 (9th Cir. 1990) (the re-examination of jury findings allowed by the Seventh Amendment includes the post-verdict review for sufficiency of the evidence, which trial court's routinely conduct).

Based upon the foregoing, the Eleventh Circuit's decision does not violate or conflict with *Reeves* and does not contravene the re-examination clause of the Seventh Amendment, and consequently, does not call for a review by this Court.

II.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY RECENT DECISION OF ANY COURT OF APPEALS AS TO THE APPROPRIATE STANDARD FOR REVIEWING A TRIAL COURT'S DECISION ON A RULE 50 MOTION

Petitioner's second question – does the district court's determination concerning judgment as a matter of

law command the same deference as factual findings at bench trials, rulings on motions for new trial, and decisions on preliminary injunctions – does not set forth a basis for *certiorari* review by this Court for two compelling reasons. First, Petitioner waived her right to raise this issue at this time having taken a contrary position below. Second, the Eleventh Circuit's decision does not conflict with any recent decisions from other courts of appeals on the correct standard of appellate review of a district court's decision to deny a Rule 50 motion.

Petitioner argues that a court of appeals should review a trial court's decision on a Rule 50 motion by a clear-error standard, and not *de novo*. (Pet. 10-12). The court of appeals reviewed the district court's denial of the Board's motion for judgment as a matter of law on both claims *de novo*, applying the same standard as the district court. (Pet. App. A at 13a). This is the precise standard that Petitioner asserted was the correct standard or scope of review in its brief submitted to the Eleventh Circuit. Specifically, Petitioner's brief stated:

> The standards by which a court, trial or appellate, must decide a motion for judgment as a matter of law were articulated in *Isenbergh v. Knight-Ridder Newspapers, Inc.*, 97 F.3d 436 (11th Cir. 1996)
>
> . . .
>
> *See also, Carter v. Decision One Corp.*, 122 F.3d 997, 1003-4 (11th Cir. 1997) ("We review a district court's denial of a defendant's renewed motion for judgment as a matter of law *de novo*, applying the same standards as the district

court"), citing, *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997).

(Brief of Plaintiff-Appellee dated September 27, 1999 at 22-23). Thus, Petitioner acknowledged that a court of appeals should review a district court's denial of a defendant's renewed motion for judgment as a matter of law *de novo*. Petitioner should not be permitted to change her position and argue for the first time in seeking review from this Court that some other standard of review should have been applied by the Eleventh Circuit.

Moreover, no conflict exists among the courts of appeals on the appropriate standard of review. Petitioner's argument to the contrary is meritless. Petitioner relies upon older decisions, two of which involved negligence claims, that can only be considered anomalies.[2] Significantly, no other courts have relied upon *Fishman* or *Kiner* as authority for applying some standard other than *de novo*. Recent decisions from the First, Eighth and Tenth Circuits, as well as virtually every other circuit court of appeals, embrace *de novo* review as the appropriate standard for reviewing a district court's grant or denial of a motion for judgment as a matter of law. These decisions arise primarily from discrimination cases. *See, Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688, 691 (5th Cir. 1999), *reversed on other grounds*, 530 U.S.___, 120 S. Ct. 2097 (2000) (court of appeals reviews denial of motion for judgment as a matter of law *de novo*, applying same

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[2] *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241 (8th Cir. 1985), *cert. denied*, 474 U.S. 888, 106 S. Ct. 208 (1985); *Fishman v. Clancy*, 763 F.2d 485 (1st Cir. 1985); *Kiner v. Northcutt*, 424 F.2d 222 (10th Cir. 1970). (Pet. 11).

standard as district court); *Morse v. Southern Union Co.*, 174 F.3d 917, 922 (8th Cir. 1999), *cert. dismissed*, 527 U.S. 1059, 120 S. Ct. 29 (1999) (in reviewing *de novo* the denial of a motion for judgment as a matter of law, we must determine whether sufficient evidence supports the jury verdict); *Moore v. Kuka Welding Systems & Robot Corp.*, 171 F.3d 1073, 1078 (6th Cir. 1999) (same); *Weisgram v. Marley Company*, 169 F.3d 514, 516 (8th Cir. 1999), *affirmed*, 528 U.S. 440, 120 S. Ct. 1011 (2000) (same); *Eberhardt v. Integrated Design & Construction, Inc.*, 167 F.3d 861, 866 (4th Cir. 1999) (same); *Baltazor v. Holmes*, 162 F.3d 368, 373 (5th Cir. 1998) (same); *Sales v. Grant*, 158 F.3d 768, 775 (4th Cir. 1998) (same); *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Company*, 152 F.3d 17, 23 (1st Cir. 1998), *cert. denied*, 526 U.S. 1123, 119 S. Ct. 1778 (1999) (same); *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998) (same); *Riemer v. Illinois Department of Transportation*, 148 F.3d 800, 805 (7th Cir. 1998) (same); *Criado v. IBM Corp.*, 145 F.3d 437, 441 (1st Cir. 1998) (same); *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1263 (10th Cir. 1998) (same); *Hathaway v. Runyon*, 132 F.3d 1214, 1220-1221 (8th Cir. 1998) (same); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997), *cert. denied sub. nom., Combs v. Metal Craft Co.*, 522 U.S. 1045, 118 S. Ct. 685 (1998) (same); *Barber v. CSX Distribution Services*, 68 F.3d 694, 698 (3d Cir. 1995) (we exercise plenary review of the district court's entry of an order granting a motion for judgment as a matter of law and for *de novo* review of the district court's conclusions of law); and *Jordan v. Clark*, 847 F.3d 1368, 1375 n. 7 (9th Cir. 1988), *cert. denied, Jordan v. Hodel*, 488 U.S. 1006, 109 S. Ct. 786 (1989) (we review the district court's final conclusion that the conduct was not so

severe or pervasive that it altered the plaintiff's employment by creating an abusive environment *de novo*).

Finally, as the Eighth Circuit recognized, "the question of whether there is sufficient evidence to support a jury verdict is a legal one." *Hathaway*, 132 F.3d at 1220-1221 (citations omitted). Issues of law should be reviewed *de novo*. Clearly, this Court reviewed *de novo* the Fifth Circuit's decision reversing the district court's denial of a motion for judgment as a matter of law in *Reeves*. Based upon the foregoing, this Court should deny the Petition.

III.

THIS COURT MAY NOT REVIEW A QUESTION NOT CONSIDERED OR DECIDED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

It is not the function of this Court to consider a question not considered or decided upon by the Eleventh Circuit. Petitioner's final question – is the existence of a hostile work environment a question of fact for the jury or a question of law for an appeals court – was not raised, considered or ruled upon by the Eleventh Circuit in this case. Rather, the issue addressed by the Eleventh Circuit concerned the sufficiency of the evidence to support the jury's verdict.

Petitioner urges this Court to exercise its *certiorari* jurisdiction by arguing that the Eleventh Circuit's decision "essentially turns the appeal of every hostile-environment claim into a question of law," which conflicts with decisions of at least three other circuit courts of

appeal. (Pet. 12). Petitioner's argument constitutes nothing more than a bald conclusion unsubstantiated by fact or law. The Eleventh Circuit's decision cannot be construed as a holding that the existence of a hostile environment claim is either a question of law or a question of fact. It never addressed this issue. It addressed the sufficiency of the evidence to support a jury verdict for Petitioner's claims for sexual harassment or retaliation. As set forth above, whether there is sufficient evidence to support a jury verdict is clearly a legal question.

In *Faragher*, 524 U.S. 775, 118 S. Ct. 2275, this Court reiterated its holdings in *Oncale*, 523 U.S. 75, 118 S. Ct. 998, *Harris*, 510 U.S. 17, 114 S. Ct. 367, and *Meritor Savings Bank v. Vincent*, 477 U.S. 577, 106 S. Ct. 2399 (1986), and concluded that "a recurring point in these opinions is that simple teasing, off-hand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment and that the standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." *Faragher*, 524 U.S. at 788, 118 S. Ct. at 2283-2284. In *Faragher*, this Court repeated the holding in *Harris* that:

> In order to be actionable under the statute, sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. *We directed courts to determine* whether an environment is sufficiently abusive by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or

> humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Id. at 787-788, 118 S. Ct. at 2283 (emphasis added) (citations omitted). This Court went on to say that "we have made it clear that conduct *must be extreme* to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view." *Id.* at 788, 118 S. Ct. at 2284 (emphasis added).

While this Court did not characterize the existence of a hostile environment as a question of law or a question of fact, it did direct the district courts and courts of appeal to determine whether the environment was sufficiently abusive so as to be actionable under Title VII.

Thus, Petitioner essentially asks this Court to re-evaluate whether the Eleventh Circuit correctly determined that the evidence was not sufficiently hostile or abusive to support the jury's verdict. That question was not presented in this Petition and does not present a basis for review under Supreme Court Rule 10.

The Eleventh Circuit recognized and applied the proper standards of review and rendered a decision that properly polices the baseline for hostile environment claims. *See, Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999) (en banc), *cert. denied*, ___U.S___, 120 S. Ct. 1674 (2000); *Indest v. Freeman Decorating*, 164 F.3d 258, 264 n. 8 (5th Cir. 1999). The Petition should therefore be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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